

U.S. Patent Application No. 10/519,156
Amendment dated June 30, 2006
Response to Final Office Action dated March 9, 2006

REMARKS/ARGUMENTS

Reconsideration and continued examination of the above-identified application are respectfully requested.

In the amendment, new claim 11 has been added. Full support for this amendment can be found, for instance, at page 2, lines 5-9 of the present application. Accordingly, no questions of new matter should arise and entry of this amendment is respectfully requested.

The Examiner's Re-numbering of the Claims is Incorrect

At page 2 of the Office Action, the Examiner objects to the claims and indicates that based on the Preliminary Amendment filed December 17, 2004, it is assumed that claims 9-11, as originally filed, are canceled. In addition, the Examiner asserts that new claims 9 and 10 have been re-numbered as claims 12 and 13. For the following reasons, the Examiner's objection and the Examiner's re-numbering of the claims are incorrect.

This application is a §371 filing. When this application was filed, and prior to the Preliminary Amendment being filed, the controlling claims were the Article 19 claims, which were filed with this application. In the Article 19 claims, claims 1-8 were pending. In the Preliminary Amendment filed December 17, 2004, the Article 19 claims were amended, as set forth in the Preliminary Amendment and, further, new claims 9 and 10 were added. Thus, the Preliminary Amendment correctly sets forth the claim numbering and properly sets forth the subject matter that was pending prior to examination of this application by the Examiner. Should there be any further questions, the Examiner is encouraged to contact the undersigned to discuss this matter or to contact the §371 Division at the U.S. Patent and Trademark Office.

The Examiner's attention is also directed to the present application's first Transmittal Letter

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to the U.S. Designated/Elected Office Concerning a Filing Under 35 U.S.C. §371, which specifically states that amendments to the claims under PCT Article 19 have been made and are attached and have been communicated by the International Bureau.

Based on this, the Examiner's re-numbering of the claims is incorrect, and the Examiner's assumptions regarding the claims with regard to canceling claims 9-11 is incorrect. Appropriate correction by the Examiner is respectfully requested.

Rejection of Claims 1-3, 5, 7, 12, and 13 Under 35 U.S.C. §102(b) -- Matsunaga

At page 2 of the Office Action, the Examiner rejected claims 1-3, 5, 7, and 12-13 under 35 U.S.C. §102(b) as being anticipated by Matsunaga (U.S. Patent No. 3,901,983). In particular, the Examiner alleged that Matsunaga discloses a dry extract obtained from dry heated peanuts (col. 2, lines 16-20, and col. 3, line 52). The Examiner further argues that it is inherent that dry heating incorporates roasting because it is a form of dry heating. The Examiner further alleged that the Matsunaga reference meets the limitations of claims 2, 3, 5, 7, and 12-13. For the following reasons, this rejection is respectfully traversed.

As stated above, the applicants will respond to this rejection using the claim numbering set forth in the Preliminary Amendment filed December 17, 2004.

Matsunaga relates to shelled and skinned peanuts that are treated to remove tannin and odor associated with peanuts (see Abstract). The thin skins (membranes) as well as any dye components are removed and discarded in order to obtain de-fatted peanut flour and peanut oil (see Abstract). Therefore, Matsunaga does not teach or suggest a dry extract obtained from roasted by-products of hard-shelled fruit and processing, whereby the by-products are membranes and/or fruit residues of hard-shelled fruits, pulses, or mixtures thereof, as claimed in the present invention. In fact,

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Matsunaga teaches away from using any of the by-products and certainly does not teach or suggest using the by-products in a dry extract for dyeing or coloring. At col. 2, lines 8-14, Matsunaga teaches removing odor, tannin, and impurities in order to facilitate extraction of oil and to produce powder that does not deteriorate. Therefore, Matsunaga teaches away from using or producing a dry extract that is obtained from roasted by-products of hard-shelled fruits and pulse processing, as claimed.

In addition, Matsunaga makes every effort to remove the thin skin from the nut itself before preparing the powder. See col. 2, lines 16-25 of Matsunaga. In addition, it is respectfully noted that in Matsunaga, the powder obtained is white to off-white in color. See col. 2, lines 2-3. It would certainly be evident to one skilled in the art that a white to a off-white powder would not be used to color foodstuff.

For these reasons, the rejection should be withdrawn.

Rejection of Claims 1-5, 7, 8, 12, and 13 Under 35 U.S.C. §102(e) As Being Anticipated By Khatchatrian et al.

At page 3 of the Office Action, the Examiner rejected claims 1-5, 7-8, and 12-13 under 35 U.S.C. §102(e) as being anticipated by Khatchatrian et al. (International Patent Application No. WO 01/53418 A2). The Examiner alleged that Khatchatrian et al. discloses a dry extract obtained from dried walnut rinds (page 2, lines 3-4), that any method of drying known in the art may be employed (page 3, lines 24-25), and that it is inherent that drying, as disclosed by Khatchatrian et al., incorporates roasting because it is a form of dry heating. For the following reasons, this rejection is respectfully traversed.

Again, claim numbering as set forth in the Preliminary Amendment filed December 17,

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2004 is being used.

As recognized by the Examiner, due to the rejection being under 35 U.S.C. §102(e), the publication date of Khatchatrian et al. is July 26, 2001, and Khatchatrian et al. was based on a earlier U.S. patent application filed January 18, 2000. No earlier U.S. filing date is claimed. On the other hand, the present application is a national phase entry of an International application filed June 18, 2003, which, in turn, claims the benefit of a German application filed June 18, 2002. In addition, attached to this amendment is a Declaration Under 37 C.F.R. §1.131 signed by one of the inventors, which states that the present application, as claimed, was conceived and reduced to practice prior to January 18, 2000. Attached to the Declaration is supporting documentation, which is a research report that details one of the experiments. The Declaration and supporting documentation support the claims as pending. In view of this Declaration, Khatchatrian et al. would not be prior art to the claimed invention.

For this reason, this rejection should be withdrawn.

Rejection of Claim 6 Under 35 U.S.C. §103(a) As Being Unpatentable Over Khatchatrian et al. in View of Fox

At page 5 of the Office Action, the Examiner rejected claim 6 under 35 U.S.C. §103(a) as being unpatentable over Khatchatrian et al. in view of Fox (U.S. Patent No. 6,132,791). The Examiner alleged that Khatchatrian et al. discloses that their resulting powder obtained may be used as a dye for foodstuffs but admitted that Khatchatrian et al. failed to disclose stabilizing anthocyanins. The Examiner alleged that Fox teaches that it is well known in the art that food products, including wine, contain anthocyanins as natural colorants, and that it would be obvious to one of ordinary skill in the art to expect that adding the dye taught by Khatchatrian et al. into these

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food products would stabilize the anthocyanins as instantly claimed. For the following reasons, this rejection is respectfully traversed.

For the reasons, set forth above, Khatchatrian et al. is not prior art to the claimed invention and for this reason alone, this rejection should be withdrawn.

In addition, there is absolutely no teaching or suggestion in either one of these two references as alleged by the Examiner. In fact, Fox teaches away from adding other colorants or stabilizers. Fox merely mentions the use of a stable ruby red natural colorant prepared from anthomycin (see Abstract). Since Fox's composition is already stable and already a colorant, there is no need to add further colorants or stabilizers as suggested by the Examiner. No proper motivation has been shown in either reference to explain how one skilled in the art would combine these different and unrelated references.

For these reasons, this rejection should be withdrawn.

Should there be any remaining issues, the Examiner is encouraged to contact the undersigned by telephone.


CONCLUSION

In view of the foregoing remarks, the applicant respectfully requests the reconsideration of this application and the timely allowance of the pending claims.

If there are any fees due in connection with the filing of this response, please charge the fees to Deposit Account No. 50-0925. If a fee is required for an extension of time under 37 C.F.R. § 1.136 not accounted for above, such extension is requested and should also be charged to said Deposit Account.

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Respectfully submitted,



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Attachment: Declaration Under 37 C.F.R. §1.131 (8 pages)